The Chicago Seven Conspiracy Trial and *United States v. Dennis*—A Comparative Activity

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For use in conjunction with "The Chicago Seven: 1960s Radicalism in the Federal Courts," by Bruce A. Ragsdale, available at http://www.fjc.gov/history/home.nsf. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association's Division for Public Education.

Activity Objectives

By comparing two cases involving restrictions on political speech and activity, students will explore the ways in which federal courts, during times of political conflict and national security threats, have interpreted the First Amendment's guarantee of freedom of speech.

Essential Questions

- Under what conditions has Congress been willing to approve restrictions on speech?
- What kinds of speech have the federal courts determined are not protected by law?
- What criteria have federal courts established for considering appeals based on the First Amendment's protection of speech?
- How had the federal courts' consideration of First Amendment claims changed between the time of the *Dennis* case and the Chicago Seven Conspiracy trial? What explains those changes?

Legal Issues Raised by the Cases

In both the Chicago conspiracy trial of 1969 and the *Dennis* trial of 1949, the prosecution of political dissidents raised questions about when speech critical of the government became a direct threat to the operation of the government or to public order and therefore was no longer protected by the First Amendment.

Estimated Time Frame

Three to four 50-minute class periods.

Recommended Prep Work

Students will need to be familiar with the events leading up to the Democratic National Convention in 1968 and with the growth of protests against U.S. involvement in the Vietnam War. Teachers should review "The Chicago Seven: 1960s

Radicalism in the Federal Courts," by Bruce A. Ragsdale, available online at http://www.fjc.gov/history/chicago7.nsf/page/chicago_seven_pdf/$file/chicago7.pdf.

Students will also need to be familiar with the Smith Act and the events surrounding the *United States v. Dennis* trial. Teachers may want to consult Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime, From the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004): 395–411; and "Dennis v. United States," in *The Oxford Companion to the Supreme Court of the United States, Second Edition*, (New York: Oxford University Press, 2005): 258–259.

Prepare student copies of the following documents:

1. The Anti-Riot Act and the Smith Act (attached)
2. Judge Hoffman, charge to the jury, February 14, 1970, and Judge Harold Medina's charge to the jury in *United States v. Dennis* (attached)
3. U.S. Court of Appeals for the Seventh Circuit, majority decision on the defendants' appeal of the criminal convictions, November 21, 1972, and the dissent of Judge Pell (attached)
4. Supreme Court opinions in *Dennis v. United States* (attached)
5. Worksheets 1, 2, and 3

Description of the Activity

Activity Overview

Students will compare three sets of documents related to restrictions on political speech during two periods of heightened political conflict and concerns about national security. Students will examine and compare the statutes under which the two sets of defendants were prosecuted; the charges to the juries in the trial phases of the cases; and various courts' decisions in the appeals of both cases.

1. Introduction

A brief review of the First Amendment and the political contexts of the trials will help prepare students to engage in the activity.

Understanding the political contexts and the perceived threats to national security

Either through student research or teacher lecture and discussion, the following background should be examined:

- The first case, *United States v. Dennis*, unfolded between July 1948 and June 1951. Review the emergence of the Cold War conflict between the United States and the Soviet Union, military tensions between the two countries, and growing fears of Communist influence within the United States.
- The events surrounding the second case, *United States v. Dellinger et al.* (the Chicago conspiracy trial), unfolded between September 1968 and De-

cember 1973. Review political unrest of the mid to late 1960s, including protests against the Vietnam War, urban riots, and a youth counterculture that challenged established political and social values. Review also the dramatic events of 1968. (See the PDF copy of "The Chicago Seven: 1960s Radicalism in the Federal Courts," by Bruce A. Ragsdale, "The Chicago Conspiracy Trial: A Short Narrative" (pp. 1–10).)

Understanding the First Amendment protections of freedom of speech

The First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Have students analyze the language of this amendment regarding speech. Does the language make it clear what is meant by "speech"? (Explore some possibilities: only "spoken words," public demonstrations, printed signs, books, song lyrics, display of patriotic symbols, etc.) What does "abridging" mean? How is the government prevented from "abridging" freedom of speech? Why is this important?

2. Comparing the Smith Act and the Anti-Riot Act

Begin with an examination of the two laws under which the defendants in these respective cases were indicted. Inform students that in each case the defendants argued that the relevant law was an unconstitutional violation of the First Amendment guarantee of free speech. Divide the class into small groups to analyze and compare the two laws using Worksheet 1. When the groups have completed their assignment, bring them together to share and discuss their analyses.

3. Comparing the Judges' Charges to the Juries

Form small groups to use Worksheet 2 for analysis of the judges' charges to the juries regarding issues of speech. When the groups have completed their assignment, bring them together to share and discuss their analyses. Note that the judge for the *Dennis* case framed his charge regarding free speech in the context of what the Smith Act indicated, while the Chicago Seven judge focused on the Constitution. Do they draw the same conclusions?

Refer students back to the acts that they previously analyzed and ask them to compare the language in the acts and the judges' charges. Look especially for words that indicate purposeful action such as "intent" and "advocacy."

4. Comparing the Court Decisions

Working in small groups, have students analyze the conflicting decisions in each case and complete Worksheet 3. Bring them back together to review their work-

sheet responses and discuss the basis for determining the constitutionality of the act under consideration.

Assign as homework a written essay answering the essential questions presented at the outset of this activity.

Debrief and Wrap-up

In a final class discussion following the written assignment, engage students in a discussion of the essential questions. To begin the discussion select one or more of the following questions:

What activities did each act make illegal? What were the potential threats to constitutional liberties presented by each act? Did the judges recognize those threats? Which decisions did students find persuasive? Under what circumstances do students think Congress might restrict political speech in the future?

Assessment

- Completed worksheets
- Classroom discussion
- Written essay

Alternative Modalities and Enrichment Activities

Research First Amendment cases related to political speech, such as *Abrams v. United States*, *Tinker v. Des Moines Independent Community School District*, and *Brandenburg v. Ohio*.

Write a brief essay explaining the following statement by Judge Learned Hand, who was writing for the majority in the *Dennis* case on appeal to the U.S. Court of Appeals for the Second Circuit:

> "In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Students can research songs that focus on the First Amendment. For an excellent source see the following webpage: http://www.freedomforum.org/templates/document.asp?documentID=14790.

Involving a Judge

Invite a judge to discuss how Supreme Court decisions since 1969 have changed the courts' interpretation of First Amendment rights.

Standards Addressed

U.S. History Standards (Grades 5–12)

Era 9—Postwar United States (1945 to early 1970s)

Standard 3: Domestic Policies after World War II

Standard 3A: The student understands the political debates of the post-World War II era.

Era 10—Contemporary United States (1968 to the present)

Standard 2E: The student understands how a democratic polity debates social issues and mediates between individual or group rights and the common good.

Standards in Historical Thinking

Standard 2: Historical Comprehension

A. Identify the author or source of the historical document or narrative and assess its credibility.
C. Identify the central question(s) the historical narrative addresses.
F. Appreciate historical perspectives.

Standard 3: Historical Analysis and Interpretation

A. Compare and contrast differing sets of ideas, values, etc.
B. Consider multiple perspectives.

Standard 5: Historical Issues-Analysis and Decision-Making

A. Identify issues and problems in the past and analyze the interests, values, perspectives, and points of view of those involved in the situation.
D. Evaluate alternative courses of action, keeping in mind the information available at the time, in terms of ethical considerations, the interests of those affected by the decision, and the long- and short-term consequences of each.

Handout 1
The Acts Under Which the Defendants Were Prosecuted

Anti-Riot Act (1967)

2101. Riots

(a) (1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent –

(A) to incite a riot; or
(B) to organize, promote, encourage, participate in, or carry on a riot; or
(C) to commit any act of violence in furtherance of a riot; or
(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph

(A), (B), (C), or (D) of this paragraph shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of the overt acts described in subparagraph (A), (B), (C), or (D) of paragraph (1) of subsection (a) and

(1) has traveled in interstate or foreign commerce, or
(2) has use of or used any facility of interstate or foreign commerce, including but not limited to, mail, telegraph, telephone, radio, or television, to communicate with or broadcast to any person or group of persons prior to such overt acts,

such travel or use shall be admissible proof to establish that such defendant traveled in or used such facility of interstate or foreign commerce.

[Document Source: 82 Stat. 75.]

The Smith Act

"An Act to prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens; and for other purposes." June 28, 1940.

SEC. 2.

(a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

[Document Source: 54 Stat. 671]

Worksheet 1
Comparing the Anti-Riot Act and the Smith Act

1. What activity is illegal under the Act?
   The Anti-Riot Act

   The Smith Act

2. What references are there to speech or to activities that may include speech?
   The Anti-Riot Act

   The Smith Act

3. What words suggest purposeful speech or activity that would violate the law?
   The Anti-Riot Act

   The Smith Act

4. What does each Act suggest about the relationship between speech and subversive activity?
   The Anti-Riot Act

   The Smith Act

Handout 2
Charges to the Juries

Judge Julius Hoffman's Charge to the Jury in the Chicago Conspiracy Trial, February 14, 1970

Ladies and gentlemen of the jury, I shall now instruct you as to what kind of conduct is not prohibited by law, and cannot, therefore, constitute grounds for conviction.

Among the most vital and precious liberties which we Americans enjoy by virtue of our Constitution are freedom of speech and freedom of assembly. The freedoms guaranteed by the First Amendment allow criticism of existing institutions, of political leaders, of domestic and foreign policies and our system of government. That right is unaffected by whether or not it may seem to you to be wrong, intemperate or offensive or designed to undermine public confidence in existing government. The law distinguishes between mere advocacy of violence or lawlessness without more, and advocacy of the use of force or illegality where such advocacy is directed to inciting, promoting, or encouraging lawless actions. The Constitution does not protect speech which is reasonably and knowingly calculated and directed to inciting actions which violate the law. A conviction can rest only on advocacy which constitutes a call to imminent unlawful action. You must keep in mind this distinction between constitutionally protected and unprotected speech.

[Document Source: *The Conspiracy Trial,* eds., Judy Clavir and John Spitzer (Indianapolis, IN: Bobbs-Merrill Co., 1970), 576.]

Judge Harold Medina's Charge to the Jury in *United States v. Dennis*, January 17, 1949

In further construction and interpretation of the statute, I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the

United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

[Document Source: Dennis v. United States, 341 U.S. 494, 511–52.]

Worksheet 2
Comparing the Charges to the Juries

1. What does each judge say about speech that is protected and speech that is not protected?

   Judge Hoffman:

   Judge Medina:

2. Do these judges agree on the character of speech that violates the law? What are the similarities or the differences?

3. What questions might the jury members have had about each judge's charge?

Decisions on the Appeals of the Convictions in the Chicago Conspiracy and the Dennis Cases

Chicago Conspiracy Case

U.S. Court of Appeals for the Seventh Circuit, Majority Decision on the Defendants' Appeal of the Criminal Convictions in United States v. Dellinger et al., November 21, 1972

The first amendment is premised upon the value of unfettered speech. Constitutional protection is clearly not to be limited, therefore, to mild or innocuous presentation, and it is unrewarding to search for a formula describing punishable advocacy of violence in terms of fervor or vigor. The real question is whether particular speech is intended to and has such capacity to propel action that it is reasonable to treat such speech as action.

The test for the attributes which speech in favor of violent action must achieve before it may be classified as action and thus removed from first amendment protection has been variously phrased—clear and present danger—directed to inciting and likely to incite imminent lawless action—whether the harm sought by expression is immediate and instantaneous and irremediable except by punishing the expression and thereby preventing the conduct—the expression is inseparably locked with action.

Our question, in examining the validity of the Anti-riot Act on its face is whether, properly construed, it punishes speech only when a sufficiently close relationship between such speech and violent action is found to exist.

Semantically the cases suggest that while a statutory prohibition of advocacy of violence is overbroad, since protected speech is included within advocacy, a prohibition of intentional incitement of violence is not overbroad. The latter depends upon a construction of "incitement" which is sufficiently likely to propel the violent action to be identified with action. . . . It seems to us that the threshold definition of all categories as "urging or instigating" puts a sufficient gloss of propulsion on the expression described that it can be carved away from the comprehensive protection of the first amendment's guarantee of freedom of speech.

[Document Source: *In re* Dellinger et al., 461 F.2d 389 (1972).]

Judge Pell's Dissent in United States v. Dellinger et al., November 21, 1972

I do not, in sum, see in the statute the guidelines by which the speaker in favor of the rightness of violence can make a safe determination. If he merely goes beyond the bare statement of the proposition by stating not only that violence is right to correct a particular abuse but that it is imperative, it seems he is within the orbit of

"urging," indeed, he maybe already be impaled by his sincerity in positing his basic proposition.

Further, and of equal significance, the present statute does not by clear intendment meet the *Brandenburg* pronouncement that advocacy is unprotected only where it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The importance of this qualification was contained in the Attorney General's letter set out hereinbefore. The advice was not heeded.

I also find an overly broad sweep in § 2101(a)(1) in the inclusion of the word "thereafter." This subsection is the basic statement of the offense. Stripped of modifying and alternative verbiage, the subsection subjects to fine and imprisonment one who travels in interstate commerce with intent to incite a riot and thereafter incites a riot. There is no required causal relationship between the travel with intent and the riot actually incited. No necessary connection whatsoever need be shown between them nor is there any time limitation as to when the overt act shall take place with relationship to the travel. I cannot conceive the constitutional validity of a statute which in this open-ended manner punishes a person at the federal level for what would otherwise be a local crime only because at some time in his past he had crossed a state line or had used a facility of interstate commerce with a nefarious intent. In the example above, I used actual inciting, but the same result would be applicable if the original travel was with the intent of aiding some other person in participating in a riot. No convicted criminal on probation is placed under such severe nonterminal strictures.

. . . While "freedom of speech" is not an absolute right and proper curbs have been spelled out by the judiciary, e. g., in the area of libel, the word "speech" itself is not qualified by a limitation of subject matter to innocuous mundanities. Imaginative or stirring ideas and idealistic beliefs are equally within its sweep. Speech without effective communication is not speech but an idle monologue in the wilderness. Communication involves listeners. A "law" which upon reasonable construction would, by its deterrent threat of punishment for the mere expression of ideas or beliefs, cellularly isolate the speaker from potential listeners in all of the states of the Union except his own would, in my opinion, abridge freedom of speech.

[Document Source: *In re* Dellinger et al., 461 F.2d 389 (1972).]

The *Dennis* Case

Supreme Court of the United States, Excerpt from the Plurality Opinion Written by Chief Justice Vinson, Decision on United States v. Dennis, December 4, 1951

The obvious purpose of the statute [the Smith Act] is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of *the statute* on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. . . .

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged. . . .

Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously the words cannot mean that, before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby

they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even those doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. . . .

Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act.

[Document Source: Dennis v. United States, 341 U.S. 494 (1951).]

Supreme Court of the United States, excerpt from the Dissenting Opinion of Justice Hugo Black in Dennis v. United States

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold §3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the

Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. . . .

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection . . .

[Document Source: Dennis v. United States, 341 U.S. 494 (1951).]

Worksheet 3
Comparing Court Decisions on the Constitutionality of the Respective Acts

Decisions on the Appeals of the Convictions in the Chicago Conspiracy

1. What, according to the majority decision in the appeal of the Chicago conviction, characterizes speech that can be restricted by law?
2. How do courts determine if speech exceeds the limits of First Amendment protections?
3. Why do you think the tests include criteria such as "present danger," "imminent," and "immediate and instantaneous"?
4. What does the court majority ask about the terms of the Anti-Riot Act?
5. Rewrite in your own words the final sentence of the excerpt from the majority's opinion.
6. Why does Judge Pell challenge the majority's reading of the Anti-Riot Act?
7. How does the Supreme Court's decision in the *Brandenburg* case (1969) affect Judge Pell's decision?
8. What, according to Judge Pell, is the significance of the word "thereafter" in the Anti-Riot Act?
9. What is the significance of a speaker's or writer's audience in Judge Pell's reading of the First amendment?

Supreme Court Opinions on the Appeal of the Convictions in the *Dennis* Case

1. In his opinion for a plurality of the Supreme Court, Chief Justice Vinson makes a distinction between discussion and advocacy. What do you think he meant? How might such a distinction be established in a court proceeding?
2. When, according to Chief Justice Vinson, does anti-government speech become a "clear and present danger"?
3. What does Chief Justice Vinson say was the goal of the conspiracy in which the defendants participated?
4. What, according to Chief Justice Vinson, determines the seriousness of a group's intent to overthrow the government?
5. Does Chief Justice Vinson's definition of speech that can be constitutionally restricted agree with the standard defined by the Seventh Circuit Court of Appeals in the Chicago case?
6. How does Justice Black describe the crime with which the *Dennis* defendants were charged? How might Chief Justice Vinson respond?

7. Why does Justice Black believe the charge against the defendants was unconstitutional?
8. Why does Justice Black think that the plurality's opinion rejects the "clear and present danger" standard?
9. What does Justice Black acknowledge to be the dangers or risks inherent in the First Amendment?